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Major Legal News and Significant Court Cases in Canada from August 2006 to November 2006

Brad Knapp

MAJOR LEGAL NEWS AND SIGNIFICANT COURT CASES IN CANADA FROM AUGUST 2006 TO NOVEMBER 2006

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I. SUMMARY OF LEGAL NEWS: CANADA'S MINISTRY OF THE ENVIRONMENT INTRODUCES CANADA'S CLEAN AIR ACT

ON October 19, 2006, Minister of the Environment, Rose Ambrose, introduced "the first and central component of Canada's New Government's environmental Agenda" to Parliament.[1] The legislation, dubbed "*Canada's Clean Air Act*," is a response to public concerns for "worsening air quality and increasing emissions of greenhouse gases."[2] Moreover, the government hopes to use the legislation to assess "people who suffer from chronic heart and respiratory illnesses."[3]

The legislation itself establishes air pollution targets "at least as stringent as those in other leading environmental countries."[4] The ambitious program seeks to reduce greenhouse gas emissions between 45 and 65 percent from 2003 levels by 2050.[5] Canada hopes to accomplish these goals through "new and emerging technologies," improving the efficiency of government vehicles, developing emission restrictions along with the automotive industry, and regulating pollutants from consumer products.[6] Emissions target levels will be developed with input from the provinces and affected industries, and all fines levied in the enforcement of the act "will be applied directly to cleaning up the environment."[7]

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* Brad Knapp is a third-year student at Southern Methodist University Dedman School of Law. He has accepted an offer at Locke, Liddell & Sapp in Dallas, Texas.

1. Press Release, Government of Canada, Canada's Clean Air Act Delivered to Canadians (Oct. 19, 2006), *available at* http://news.gc.ca/cfmx/view/en/index.jsp?articleid=248459 (last visited Dec. 15, 2006).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

II. SIGNIFICANT COURT DECISIONS

A. SUPREME COURT DECIDES ISSUE OF SOLICITOR-CLIENT PRIVILEGE

The Supreme Court, in September 2006, distinguished two of the privileges available in Canada: the solicitor-client privilege and the litigation privilege.[8] The Supreme Court had to determine "whether documents once subject to the litigation privilege remain privileged when the litigation ends."[9]

The case arose from a failed Canadian government prosecution of the defendant, Blank and Gateway Industries, Ltd. for pollution of the Red River and violation of various regulatory acts.[10] When those prosecutions were quashed, Blank and Gateway sued the government for fraud, conspiracy, abuse, and abuse of prosecutorial powers.[11] As part of that litigation, Blank requested documents under the Access to Information Act, and those requests were denied under the "solicitor-client privilege."[12] The resulting litigation challenged the duration of the litigation privilege under section 23 of the Access to Information Act with both lower courts determining that the privilege ends at the end of litigation.[13]

The opinion reiterates the importance of the solicitor-client privilege in encouraging "full, free and frank communication between those who need legal advice and those who are best able to provide it."[14] The litigation privilege, on the other hand, is to preserve the adversarial system by protecting communications between the solicitor and third parties.[15] The policies are drastically different: the solicitor-client privilege, with its protection of the solicitor-client relationship, lasts throughout and after the relationship regardless of litigation.[16] The litigation privilege exists in the context of a particular case and protects investigation and trial preparation.[17] The Supreme Court compared the litigation privilege to the U.S. "attorney work product" privilege.[18]

In short, the purpose of the litigation "is to create a 'zone of privacy' in relation to pending or apprehended litigation," meaning that the end of the litigation causes the privilege to lose its purpose.[19] Based on this policy, the Court determined that the privilege ends with termination of litigation.[20] In this case, the end of the criminal prosecution by the

8. Blank v. Canada (Minister of Justice), 2006 S.C.C. 39, 30553, [2006] 2 S.C.R. 319 (Sept. 8, 2006), *available at* http://scc.lexum.umontreal.ca/en/2006/2006scc39/2006scc39.html.
9. *Id.* ¶ 22.
10. *Id.* ¶¶ 12-14.
11. *Id.* ¶ 14.
12. *Id.*
13. *Id.* ¶¶ 16-19.
14. *Id.* ¶ 26.
15. *Id.* ¶ 27.
16. *Id.* ¶ 28.
17. *Id.*
18. *Id.* ¶ 30.
19. *Id.* ¶ 34.
20. *Id.* ¶ 36.

government of Canada ended that litigation, and the government cannot be protected from turning over documents in a separate civil action challenging that prosecution.[21] While litigation and the end of litigation will be defined broadly, the court clarified that the privilege can never serve as a "black hole" to hide blameworthy conduct.[22]

B. Forum Selection Case Acknowledges Growth of Cross-Border Commercial Disputes

In a legal battle between beer industry giants, Miller Brewing (Miller) claimed victory over Molson Coors in a motion arguing forum non conveniens.[23] Miller wanted to stay proceedings in Ontario to allow adjudication of the claim in a previously filed action in the federal district court for the Eastern District of Wisconsin.[24]

Off and on since 1982, Molson Incorporated, a Canadian beer company, had retained a license to brew and distribute Miller beers in Canada.[25] In 2005, Adolph Coors Company merged with Molson to form Molson Coors Brewing Company (Molson Coors), leaving Miller concerned about its trade secrets as well as the competitive disadvantages of having a key rival, Coors, in charge of distribution of Miller products.[26] The license agreement did not have a forum selection clause that covered the dispute, so, after a break-down in negotiations, Miller filed suit in Wisconsin alleging breaches of the license agreement, frustration of the essential purposes of the license agreement, violations of U.S. and Wisconsin anti-trust laws, and violations of Canadian and Ontarian competition laws.[27] After receiving a one-month extension in filing its answer in Wisconsin, Molson Coors filed suit in Ontario to enforce the license agreement.[28] Molson Coors then sought dismissal of the suit in the Eastern District of Wisconsin on grounds of forum non conveniens.[29] The State of Wisconsin denied the motion, and Miller presented its motion for forum non conveniens to the Ontario court.[30]

The court outlined the factors to be considered:

(1) the location of the majority of the parties;

(2) the location of key witnesses and evidence;

(3) contractual provisions that specify applicable law or accord jurisdiction;

(4) the avoidance of multiplicity of proceedings;

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21. *Id.* ¶ 42-43.
22. *Id.* ¶¶ 44, 48.
23. Molson Coors Brewing Co. v. Miller Brewing Co., 06-CL-6420, [2006] O.J. 4236 QUICKLAW (O.S.C.J. Oct. 23, 2006).
24. *Id.* ¶ 1.
25. *Id.* ¶ 2.
26. *Id.* ¶¶ 3, 5.
27. *Id.* ¶ 6.
28. *Id.* ¶ 8.
29. *Id.* ¶ 9.
30. *Id.* ¶ 12.

(5) the applicable law and its weight in comparison to the factual questions to be decided;

(6) geographical factors suggesting the natural forum;

(7) whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic forum.[31]

The court noted that the factors did not ease the decision since both companies have a significant presence in both countries and engage in transactions that involve both sides of the border.[32] Even the choice of law clause in the contract, which specified the governing law as that of Ontario, refused to select a forum; given the sophistication of the parties, the court interpreted this as allowing Miller to sue in the United States.[33]

Given these facts, the court was left with a central question: "how should Ontario courts approach a request for a stay of proceedings under the doctrine of *forum non conveniens*, when the parties in question are involved in parallel proceedings in another jurisdiction and both jurisdictions are determined to be appropriate fora?"[34] Parallel proceedings tend to be a waste of resources and, the court noted, can result in inconsistent results.[35] While eliminating parallel proceedings could create "a race to file," allowing parallel proceedings runs a similar risk, "a 'race to judgment'" so that one disposition will estop the other.[36]

The court then moved to a policy analysis. The court noted the immense amount of trade between the United States and Canada with the continual flow of goods and people back and forth; trade that has made "commercial disputes that straddle our border . . . more and more common."[37] In the increase of the "cross-border relationship[ ]," justice systems must be able to "resolve disputes in a timely, efficient, consistent and predictable manner."[38] Allowing parallel proceedings will work "against the achievement of a more seamless continental economy" and reliance on principles of international comity can help achieve better dispute resolution.[39]

In this case, since the court dealt with sophisticated parties who would not be burdened by geographical or evidentiary concerns, the avoidance of a parallel adjudication proved dispositive.[40] The proceedings in Ontario were stayed in favor of the Eastern District of Wisconsin.[41]

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31. *Id.* ¶ 16.
32. *Id.* ¶ 17.
33. *Id.* ¶ 19-20.
34. *Id.* ¶ 27.
35. *Id.* ¶ 33.
36. *Id.* ¶ 34.
37. *Id.* ¶ 40.
38. *Id.*
39. *Id.*
40. *Id.* ¶ 41.
41. *Id.* ¶ 42.

C. Court of Appeal for Ontario Enforces Validity of Forum Selection Clause Naming Iran as the Appropriate Forum

The bankruptcy of Canadian Triton International Ltd. (CTI) left its creditor and assignee, Crown Resources Corporation, to collect on a series of contracts that CTI made with the National Iranian Oil Company (NIOC) and its subsidiary, the National Iranian Drilling Company (NIDC).[42] The NIOC and NIDC argued that forum selection clauses choosing Iran should be applied to remove the contract litigation from the Canadian courts, and, for the contracts that did not name Iran in the forum selection clauses, the act of state doctrine and sovereign immunity should prevent Canada from adjudicating those claims.[43]

The court determined that forum selection clauses should be enforced absent "strong cause for not doing so."[44] While some evidence pointed to general unfairness in Iranian civil trials, the court determined that the parties selected the law of that forum with full knowledge of the risk of having to litigate in Iran.[45] The court noted that the Iranian legal system has not deteriorated since the signing of the contract in 1990, and by assuming the risk of the Iranian legal system, CTI gained a contract worth $250 million.[46] Similarly, a 1998 contract between the parties contained a forum selection clause naming Ontario as the forum, and the court determined that these claims must be pursued in Ontario.[47] Finally, a contract lacking a forum selection clause was found to support jurisdiction in Iran when the contract was negotiated in Iran, involved the hiring of Iranian employees, involved the purchase of equipment in Iran, involved payment in Iranian currency, and was breached in Iran.[48]

42. Crown Res. Corp. v. Nat'l Iranian Drilling Co., C44290 & C44291, [2006] O.J. 3345 QUICKLAW (C.A.O. Aug. 22, 2006).
43. *Id.* ¶¶ 1-9.
44. *Id.* ¶ 24.
45. *Id.* ¶ 26.
46. *Id.*
47. *Id.* ¶ 51.
48. *Id.* ¶ 63.